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Supreme Court, U.S.
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No.
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Supreme Court of the United States
OCTOBER TERM 1990

JOSEF BEN-PORAT, CLAIRE BEN-PORAT,
IRVIN L. MORHAR, JANET MORHAR,
BEN ROCHELLE, the Estate of
JANE BEEBE ROCHELLE,
GERALD P. BARON, and BONNIE BARON,
Petitioners,
vs.
COMMISSIONER OF THE INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether, in cases involving the assertion by the Commissioner of Internal Revenue of penalties for negligence under 26 U.S.C. § 6653 (a) (1) and 6653 (a) (2), the lower courts should apply the standard announced by this court in **U.S.** v. **Boyle** 469 U.S. 241, 105 S.Ct. 687, 83 L.Ed.2d 622 (1985) and followed by numerous decisions of the Courts of Appeal and of the U.S. Tax Court; namely, that a taxpayer who received advice from an accountant or an attorney on a matter of tax law may reasonably rely upon that advice and is not obligated to seek a second opinion or to try to monitor his advisors on the meaning of provisions of the Code or whether the Court should apply the completely new standard adopted in this case by the U.S. Tax Court below and by the one three judge panel of the U.S. Court of Appeals of the Ninth Circuit; namely, that a taxpayer may not reasonably rely upon the advice of an accountant with whom he has dealt for many years simply because that accountant may, without the knowledge of the taxpayer, have received commissions in connection with the transaction which is reflected on the taxpayers tax return, that a taxpayer may not reasonably rely upon certified financial statements provided to him and to his accountant by Laventhol and Horwath, a big eight accounting firm, stating that the amounts paid out by the taxpayer qualify as research and development expenditures for purposes of 26 U.S.C. § 174, and that a taxpayer and his accountant may not reasonably rely upon a lengthy tax opinion provided to himself and to his

accountant by William Beverly, Esq., with the express intent that the taxpayer and his accountant should rely upon that opinion, discussing the facts and circumstances of a proposed transaction and concluding, on the basis of applicable law, that the taxpayer is entitled to deduct amounts paid out by him in connection with the proposed transaction as research and development expenditures under 26 U.S.C. § 174?

2. Whether, in cases involving the deductibility of amounts as research and development expenses under 26 U.S.C. § 174, the lower courts should apply the standard set forth by this Court in **Snow et ux.** v. **Comm.** 416 U.S. 500, 94 S.Ct. 1876, 40 L.Ed.2d 336 (1974); namely, that, in accordance with the intent of Congress in adopting the incentives for research and development expenditures in 26 U.S.C. § 174, taxpayers in small or pioneering business enterprises should have equal access to the tax incentives afforded by 26 U.S.C. § 174 along with established firms with on-going businesses and research programs and that the ". . . in connection with his trade or business . . ." language contained in 26 U.S.C. § 174 (a) (1) should not be interpreted in such a way as to cut off taxpayers in small or pioneering business enterprises from equal access to those tax incentives or whether the courts should sanction the attempts of the U.S. Tax Court and of one three judge panel of the Ninth Circuit Court of Appeals in this case below to reverse and subvert the decision of this court in Snow and to resurrect the completely inconsistent legal standards previously adopted by the U.S. Tax Court in **Snow** v. **Comm.** 58 T.C. 585 (1972) and by one three

judge panel of the U.S. Court of Appeals for the Sixth Circuit 482 F2d 1029 (CA 6, 1973) and soundly rejected by this Court; namely, that the ". . . in connection with the trade or business . . ." language set forth in 26 U.S.C. § 174 (a) should be used to cut off access of small and pioneer businesses to the tax incentives provided by 26 U.S.C. § 174, especially in cases in which the taxpayers who claim the deductions are not themselves inventors and, because of their involvement in other businesses, conduct the businesses which give rise to the research and development deductions through sub-contractors rather than directly?

3. Whether, if this Court chooses to reject the legal standards applied below by the U.S. Tax Court and by one panel of the Ninth Circuit Court of Appeals in depriving the petitioners of the full amount of deductions claimed by them under 26 U.S.C. § 174, the end result reached below by the U.S. Tax Court and by one panel of the Ninth Circuit Court of Appeals should be upheld simply because the transaction, as a matter of objective fact, involved circular financing, the facts relating to which were completely unknown to the petitioners and which were so well camouflaged by the promoters that even Laventhol and Horwath, a big eight accounting firm, was unable to uncover the existence of the circular financing during the preparation of certified financial statements to be made available to the petitioners and other participants in this transaction when the petitioners, upon investigation of the complex facts relating to the circular financing, have conceded their entitlement to that portion of the

research and development deductions under 26 U.S.C. § 174 attributable to the circular financing?

4. Whether, if this Court chooses to reject the legal standards applied below by the U.S. Tax Court and by one panel of the Ninth Circuit Court of Appeals in depriving the petitioners of the full amount of deductions claimed by them under 26 U.S.C. § 174, the end result reached below by the U.S. Tax Court and by one panel of the Ninth Circuit Court of Appeals should be upheld simply because the Commissioner presented evidence that other participants in the same transaction had been given side agreements purporting to give them extensions to pay off loans received by them in connection with the transaction when the uncontradicted evidence indicates that three of the petitioners, Morhar, Ben-Porat, and Rochelle, in these consolidated cases never heard of or saw any such side agreement and that the fourth petitioner, Baron, saw a draft, but never an executed original, of such a side agreement, several years after he had obtained loans and executed unconditional promissory notes in connection with the transactions at issue in this case when the petitioners, upon investigation of the complex facts relating to the circular financing, have conceded their entitlement to that portion of the research and development deductions under 26 U.S.C. § 174 attributable to the circular financing and when the Commissioners own internal records confirm that only some participants in the transaction, not including the petitioners in this case, ever had any knowledge of such side agreements at the time they entered into the transactions in question?

5. Assuming, for the purposes of argument, that this Court decides that the courts below applied incorrect legal standards in determining that the petitioners were not entitled to a deduction, under 26 U.S.C. § 174, as research and development expenses for amounts expended by them in connection with the transaction which is the subject of this case and assuming, for the purposes of argument, that this Court chooses to analyze the case below under the "sham" standard announced by this Court in **Frank Lyon Co.** v. **U.S.** 435 U.S. 561, 98 S.Ct. 1291, 55 L.Ed.2d 550 (1978), whether the analyses of the courts below are not also incorrect under this standard since the courts below did not find, and could not find, on the basis of the evidence presented below, as **Lyon** requires, **both** that, as a matter of subjective fact, the petitioners were motivated by no business purpose other than obtaining tax benefits in entering into the transaction **and**, as a matter of objective fact that the business transaction has no economic substance because no reasonable possibility of profit existed?

6. Whether the U.S. Tax Court and one panel of the Ninth Circuit Court of Appeals did not commit error in finding the petitioners liable for the additional interest penalty set forth in 26 U.S.C. § 6621 (c) in light of the fact that the petitioners, upon investigation of the complex facts relating to the circular financing, have conceded their entitlement to that portion of the research and development deductions under 26 U.S.C. § 174 attributable to the circular financing and in light of the recent **en banc** decision

of the U.S. Tax Court in **McCrary** v. **Comm.** 92 T.C. 827 (1989) which held that the imposition of the additional interest penalties set forth in 26 U.S.C. § 6621 (c) was improper and inconsistent with Congressional intent in cases such as this, in which the petitioners, after investigation and confirmation of facts indicating the existence of circular financing, conceded their entitlement to the portion of the deductions attributable to the circular financing and in light of the fact that the decision of the courts below were based upon a finding that the petitioners were not entitled to deductions under 26 U.S.C. § 174 because the petitioners were not engaged in trade or business, a ground for disallowance which, according to the clear language of 26 U.S.C. § 6621 (c), simply does not serve as a grounds for the assertion or upholding of any penalty under 26 U.S.C. § 6621 (c).

7. Whether the U.S. Tax Court below did not commit reversible error, under the abuse of discretion standard set forth in **Hansen** v. **Comm.** 820 F2d 1464 (CA 9, 1987), in conducting private conferences with Robert Aronson ("Aronson"), the promoter of this transaction, and his attorney, during the consolidated trial of the cases of the petitioners and of Aronson and his related companies and in refusing the request of the petitioners that the terms of the settlement reached by the Commissioner and Aronson and his related entities during the trial be made part of the record of these cases in light of the fact that later investigation revealed that the Commissioner had compromised a $100 million tax claim against Aronson and his related entities for $20,000 just before Aronson

proceeded to give certain pre-negotiated and false testimony on the issue of circular financing which completely contradicted all of Aronson's prior statements on this issue and which also contradicted Aronson's subsequent testimony under cross-examination during the continued trial of the petitioners' cases in U.S. Tax Court and whether the one three judge panel of the U.S. Court of Appeals for the Ninth Circuit did not commit reversible error in finding that the U.S. Tax Court had not violated the abuse of discretion standard with respect to these matters?

LIST OF PARTIES

The parties to the proceeding in the United States Court of Appeals for the Ninth Circuit below were Josef Ben-Porat, Claire Ben-Porat, Irvin L. Morhar, Janet Morhar, Ben Rochelle, the estate of Jane Beebe Rochelle, Gerald P. Baron, and Bonnie Baron. Each of these parties seeks to have the decisions of the U.S. Tax Court, as affirmed by the U.S. Court of Appeals for the Ninth Circuit reversed by this Court.

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OPINIONS BELOW

The opinion below of one panel of three judges of the U.S. Court of Appeals for the Ninth Circuit was not published and is reproduced in the Appendix, Vol. , pp. _____.

The opinion of the U.S. Tax Court below (Judge Charles R. Simpson) is reported at 55 T.C.M. 933 (1988) **sub. nom. Jay et. al. v. Comm.** and is reproduced in the Appendix, Vol. , pp. _____.

The decisions of the U.S. Tax Court below in these consolidated cases were not published and are reproduced in the Appendix, Vol. , pp. _____

The administrative determinations of the Commissioner of Internal Revenue in these cases, commonly known as statutory notices or ninety-day letters, were not published and are reproduced in the Appendix, Vol. , pp. _____.

The responses of the individual petitioners to the Commissioner's administrative determinations, in the form of petitions filed with the U.S. Tax Court, together with the Commissioner's answers to those petitions, were not published and are reproduced in the Appendix, Vol. , pp. _____.

JURISDICTION

The decision of one three judge panel of the U.S. Court of Appeals for the Ninth Circuit was filed on July 10, 1990. There have been no petitions for rehearing filed with the U.S. Court of Appeals for the Ninth Circuit nor have any orders been applied for or issued granting any extension of time within which to file this petition for a writ of certiorari.

This Court has appellate jurisdiction in all cases arising under the laws of the United States under Article III, § § 1 and 2 of the Constitution of the United States. This case arises under the Internal Revenue Code, 26 U.S.C. § § 1 **et. seq.** Moreover, this Court

has specific jurisdiction to review any judgment of a U.S. Court of Appeals which has reviewed a decision of the U.S. Tax Court under 26 U.S.C. § 7482 (a) (1). This review is authorized by 28 U.S.C. § 1254 pursuant to a petition for a writ of certiorari.

The U.S. Court of Appeals for the Ninth Circuit had jurisdiction over these cases pursuant to 26 U.S.C. § 7483.

The U.S. Tax Court had jurisdiction over these cases pursuant to 26 U.S.C. § 7442.

Pursuant to Rules 13 and 30 of the Rules of this Court, the last day for filing this petition is October 9, 1990 since the 90th day after July 10, 1990 falls on October 8, 1990 which is a federal legal holiday which celebrates the rediscovery of America by an Italian, Columbus, many hundreds of years after the original discovery of America by Saint Brendan, an Irish monk, who lacked the desire or resources necessary to retain a good public relations firm.

PROVISIONS OF LAW

The following provisions of law are involved in this case and are reproduced in the Appendix:

1. 26 U.S.C. § 174 and Regulations issued thereunder by he Commissioner under that Section –Appendix, Vol. , pp. _____.
2. 26 U.S.C. § 6653 (a) (1) and (a) (2) – Appendix, Vol. , pp. _____. The cases before the Court involve both 1980 and 1981 taxable years. For the taxable year 1980, only the penalty set forth in 26 U.S.C. § 6653 (a) (1) is applicable since the penalty set forth in 26 U.S.C. § 6653 (a) (2) is applicable only to tax years after 1980.
3. 26 U.S.C. § 6621 - Appendix, Vol. , pp. _____.

STATEMENT OF THE CASE

1. Rarely does this Court encounter a case such as this in which the ultimate facts, in cases and provisions of law, and the underlying social issues are framed so clearly by the evidence presented below and by subsequent events. Naturally, it would be too good to be true if the path from the evidence presented below to the ultimate facts and issues of law were so easy. Because the "findings of fact" of the Tax Court below which were adopted, without further opinion or discussion, by the one three judge panel of the U.S. Court of Appeals for the Ninth Circuit deviate so radically from the uncontradicted evidence presented below, the petitioners in these cases have taken the liberty, afforded to them by Rule 14.1 (k) (v), of reprinting and providing to the Court in various volumes of Appendix portions of the evidence presented below.

2. **Unfortunately, some of the most crucial evidence cannot be made available to this Court, unless this Court elects to obtain this evidence from the exhibits currently in the custody of the U.S. Court of Appeals for the Ninth Circuit. Petitioners' exhibit 35 consists of two video tapes, in VHS format, which were seen by the petitioners before they entered into the transactions which are the subject of this case and which contain histories of the development of the Silver Volt and of the previous electric vehicles developed by Aronson and his related companies. The video tapes also contain excerpts from national television shows which covered the development and testing of the Silver Volt. In addition, the petitioners are currently missing and, as a result, cannot reproduce at this time, exhibits 50 and 51 from the U.S. Tax Court trial which are brief but which contain some of the key agreements illustrating how expertly and**

deviously Aronson and his attorneys and accountants were able to camouflage the circular funding involved in this transaction.

3. The materials which will be provided in separately bound volumes are grouped into six different categories. Category number 1, which is contained in Appendix Vols. _____, consists of the relevant statutes and regulations, pursuant to Rule 14.1 (f), and of the opinions below, the administrative determinations below, and of copies of a small number of key court opinions relevant to this Court's consideration of this petition. Category number 2, which is contained in Appendix Vols. _____, consists of excerpts from the transcript of the U.S. Tax Court trial below. Category number 3, which is contained in Appendix Vols. _____, consists of excerpts from documentary exhibits presented during the U.S. Tax Court trial and of other materials illustrating the underlying business transaction as seen through the eyes of the petitioners, especially Irvin Morhar. Category number 4, which is contained in Appendix Vols. _____, consists of excerpts from documentary exhibits presented during the U.S. Tax Court trial proving, by reference to the U.S. government's own internal audits, the technical failure of the U.S. Department of Energy to develop a practical electric vehicle after paying out over $180 Million Dollars of taxpayer funds to such wonderful subcontractors as Ford, General Motors, Chrysler, General Electric, and Volkswagen. Category number 4 also contains excerpts from the documentary exhibits presented below and from other materials proving the expenditure by General Motors of in excess of $50 Million Dollars in a continuing and still, to this day, unsuccessful effort to develop a practical electric vehicle. Category number 4 also contains the testimony of one George Frost, a patent attorney, who had previously worked for

General Motors and who admitted, under cross-examination, that he had never negotiated a research and development contract in his professional career and that he had no knowledge of the provisions of the RICO statute, 18 U.S.C. §§ 1961-1968. Despite Mr. Frost's admissions of his close connections with General Motors, a competitor of the petitioners in this case in their effort to complete the development of an electric vehicle known as the Silver Volt, the Tax Court below relied, almost exclusively, on Mr. Frost's testimony in areas in which Mr. Frost himself admitted he was not an expert. In light of the U.S. government's own internal audits of the unsuccessful efforts of the D.O.E. program to develop an electric vehicle and in light of the continued failure of General Motors to do so, Mr. Forst's testimony becomes even more ludicrous than it is on the surface. Category number 5, which is contained in Appendix Vols. _____, consists of excerpts from the documentary exhibits presented in the U.S. Tax Court and other materials illustrating how expertly and deviously Aronson and his attorneys and accountants camouflaged the circular financing involved in this transaction and, despite Aronson's false testimony to the contrary presented during the Tax Court trial immediately after the Commissioner had reduced his tax claims against Aronson and his related companies from $100 Million Dollars to $20,000, Aronson and his co-conspirators intended and are still attempting to use that circular financing to deprive the petitioners in this case and hundreds of other U.S. citizens of their ownership and legal rights to the technology and products developed as a result of this transaction. Category number 6, contained in Appendix Vols. _____, consists of excerpts from the documentary exhibits presented in the U.S. Tax Court and of other materials illustrating how the Commissioner used unfair and illegal procedures to force

Aronson to give false testimony about the circular financing involved in this transaction and how the Commissioner and the U.S. Tax Court improperly kept evidence relating to these illegal procedures out of the record below.

4. While this petition is framed in terms of technical provisions of the U.S. Tax Code, it is the underlying social and economic issues which will be brought to light in this statement of the case which are the crucial issues which will govern this Court's decision to grant this petition for a writ of certiorari and to reverse the decisions of the courts below.

5. These cases bring before this Court two forces in American society which logically should not be in conflict but which, for purposes of these cases and because of imperfections inherent in the administration of our Internal Revenue system, are locked, before this Court, in a life or death struggle, the outcome of which will have a crucial influence on the future dependence of this country on foreign oil since the decision of this Court in these cases will determine whether the key technology necessary to put into mass production practical electric vehicles will be controlled by a group of American small businessmen or will be controlled by principals of the government of Kuwait or citizens of other foreign countries.

6. The first force in American society before this Court consists of hundreds of small businessmen located all over the U.S., including the petitioners in this case, who, during the late 1970's and the early 1980's, participated with Aronson in developing the products and technology necessary to build and to produce a practical electric vehicle, known as the Silver Volt, for use initially in Southern California where the smog problems are most serious and then in the rest of the U.S. and all over the world.

7. The second force in American society before

this Court is the U.S. Internal Revenue system and its well publicized campaign in the press, in Congress, and before the courts to brand as criminals and enemies of society anyone who became involved in transactions which the Commissioner chose, after the fact, to call tax shelters. While the clear intent of Congress, in adopting the incentives for research and development in 26 U.S.C. § 174, as affirmed by this Court in the **Snow** decision, **supra,** was to promote the development of new products and technology in order to keep the American economy competitive in the world market, the actions of the Commissioner and of the U.S. Tax Court in this case constitute nothing more than a blatant attempt to subvert the intent of Congress and the prior decisions of this Court. The net result of the Commissioner's vicious campaign against the petitioners, the other participants in this transaction, and Aronson, has been to squash, until this Court can correct this situation, the only successful effort so far in the U.S. to develop a practical electric vehicle in order to eliminate the dependence of this country on foreign oil and in order to eliminate the serious smog problems in Southern California and in other areas of the country caused primarily by the operation of gas powered vehicles. The net result of the Commissioner's vicious campaign against the petitioners, the other participants in this transaction, and Aronson has been greatly to reduce large future tax revenues which would have been paid to the government as a result of the successful production and sale of electric vehicles to the public by Mr. Aronson and by the participants in this transaction in return for significantly smaller revenues which the Commissioner seeks to extract from the petitioners and from other participants in this transaction in the form of punitive taxes and penalties. The Commissioner's vicious campaign has already made it impossible for

the petitioners, for other participants in this transaction, and for Aronson to continue with the testing and development which had brought the Silver Volt, the electric vehicle developed, built, and tested in prototype form, to the verge of being ready for mass production. The Commissioner's vicious campaign has also made the petitioners and millions of other honest taxpayers who became involved in similar transactions reluctant or completely unwilling to participate in any other transactions involving small or pioneering business enterprises.

8. The widespread discontent spread by the Commissioner's vicious campaign against the petitioners and millions of other honest taxpayers who innocently became involved in similar transactions has already had serious political consequences. In 1986, Congress, in response to widespread public outrage with the Internal Revenue system, adopted the Tax Reform Act of 1986 which went a long way towards eliminating the tax system, based on deductions and credits, which was in force in 1980 and 1981, the years when the transactions which are before this Court took place. In 1988, Congress, in response to widespread public outrage with the Internal Revenue system and based on hearings conducted before a Senate committee investigating abuses by the Internal Revenue Service, adopted a Taxpayers' Bill of Rights, co-sponsored by Senator Pryor of Arkansas and Senator Hatch of Utah, which, for the first time, gave U.S. taxpayers civil causes of action against the Commissioner and against agents of the Commissioner who abused the rights of taxpayers. In 1989, Congress, in response to the same public outrage, adopted legislation completely overhauling and largely eliminating, prospectively only, the vast array of draconian penalties which the Internal Revenue Service had persuaded Congress to adopt over the

years and which penalties were clearly being used abusively by the Commissioner and by the U.S. Tax Court in order to bludgeon honest U.S. taxpayers into blind obedience to the wishes of the Internal Revenue Service, a bureaucracy which, according to the Senate hearings conducted before Senators Pryor and Hatch, has grown into a shadow government with little, if any, regard for the constitutional rights of U.S. citizens. **See** Appendix, Vol. , pp. .

9. The political battles in Congress will go on and are obviously not the concern of the members of this Court, except in their capacity as honest U.S. taxpayers and voters. The cases which are before this Court in this petition, however, present this Court with an opportunity to correct the unfortunate results of the Commissioner's vicious and ill-conceived campaign against these petitioners, to put this country back at the forefront of the technological race to produce a practical electric vehicle, and to serve as a warning to the Commissioner, to the U.S. Tax Court, and to those unfortunate members of the U.S. Courts of Appeal who have allowed themselves to be influenced to cooperate in the Commissioner's campaign that this Court will simply not tolerate the subversion of the prior decisions of this Court and of the intent of Congress regardless of the social and economic purposes which the Commissioner and certain members of the U.S. Tax Court may mistakenly think, in good faith, are being served by their punitive punishment of all participants in tax shelter transactions.

10. The historical patterns of the development of the new products and technology on which this country's economy is based are quite clear. The process of invention and development is one in which, according to U.S. government studies, only about 10% of projects undertaken and pursued in good faith are successful, despite the existence of complex

schedules and reporting requirements. According to the same U.S. government studies, the major effect of complex scheduling and reporting requirements which exist as a part of most government research contracts is not to increase efficiency or to increase the chances of meeting development schedules but is simply to use up 75% of each research dollar to comply with red tape requirements rather than to do research. **See** Appendix, Vol. , pp. _____.

11. The development of the Xerox machine is a typical illustration of the unknown costs, unpredictable results, and substantial time lapse between expenditures for research and development and the successful commercial sale of resulting products. Chester Carlson made the discoveries fundamental to xerography working in his spare time in his kitchen during the Depression. In 1937, Carlson filed his first patent application in connection with the Xerox machine. From 1937 through 1944, Carlson was turned down by more than twenty companies, including IBM, as he sought to commercialize his product and lived and worked in poverty in order to do so, depending on the participation and contributions of some small businessmen who had faith in Mr. Carlson and in his product. Not until 1947 was Carlson able to persuade, not an American, but an Englishman, Joseph Rank to join him in an attempt to put his Xerox machine into full scale commercial production. The first Xerox machine, a 914, was introduced and sold in 1959. **See** Appendix, Vol. , pp. _____. The tremendous economic benefits which this country has received as a result of Mr. Carlson's efforts are a matter of record. Also a matter of record is the fact that many other countries in the world have already caught or surpassed the U.S. in many areas of technological innovation and that this country can no longer afford to ignore or to treat as enemies of

society people like Mr. Carlson or small businessmen who may have the faith and foresight to participate in the development of such products when large established businesses sitting comfortably on top of large cash flows do not want to rock the boat by taking a chance. **It goes without saying that the Xerox machine never would have become available to this country if Mr. Carlson and the small businessmen who supported his initial efforts had been subjected to the type of vicious attack by the Commissioner to which the petitioners in these cases, other participants in this transaction, and Aronson have been subjected.**

12. Prior to 1966, Aronson owned and operated battery factories in Puerto Rico and in Louisiana. During 1966, by accident, Aronson discovered and obtained a patent for a unique method of recharging batteries in 45 minutes rather than in the normal 8 hours. **See** Appendix, Vol. , pp. _____.

13. In 1966, Aronson's battery factory in Louisiana was destroyed by a hurricane. During the period when Aronson was unsuccessfully attempting to collect on the insurance policy which covered his battery factory, Aronson, making use of his fast charge battery, built his first experimental electric vehicle, known as the Mars One. **See** Appendix, Vol. , pp._____.

14. Soon thereafter, Aronson moved his operations to Detroit, Michigan and formed a corporation known as Electric Fuel Propulsion Corporation ("EFP"). By 1976, after building more than 50 prototype electric vehicles and developing some, but not nearly all, of the special equipment needed to develop and build a practical electric vehicle for everyday use, Aronson and EFP were running short of funds. **See** Appendix, Vol. , pp._____.

15. In 1976, one of EFP's shareholders, Robert

Wenz ("Wenz"), introduced EFP and Aronson to a plan whereby EFP would continue its development work in cooperation with various groups of small businessmen. Pursuant to a typical Wenz' transaction, EFP would contract with a corporation formed by a small group of businessmen unrelated to EFP to develop for them a particular product which could be used in connection with building a practical electric vehicle as well as in other applications. Typically, EFP would agree to perform all of the development work in return for a fixed turnkey fee. The unrelated small businessmen would borrow, from a local bank, a portion of the development fee to be paid fully in cash to EFP. EFP would then purchase the notes of the small businessmen from the bank. If the product were developed quickly and produced revenues, a portion of those revenues would be used to pay down the principal and interest on the notes and used by EFP to development improvements for the product. All of the resulting technology would belong to the small businessmen who, hopefully, would agree to license the use of that technology to EFP. If the product were not developed quickly and the profits from the resulting product were not sufficient to pay off the note and interest within 8 or 10 years, the small businessmen would have the choice of either paying off the note and interest or having EFP, using the notes, foreclose on the small businessmens' rights to the product. Pursuant to a typical transaction, EFP would report as income the full amount of cash, including amounts used to purchase notes, received pursuant to each development contract and the small businessmen would report as research and development deductions the full amount of cash, including borrowed amounts, paid out by them in connection with the transaction. **See** Appendix, Vol. , pp_____.

16. After consummating a number of such

transactions involving Wenz and after successfully developing a number of products, Aronson and EFP had a falling out with Wenz and consulted with Howard Braitman ("Braitman"), a senior partner, specializing in tax shelters, at Price Waterhouse & Co., one of the big eight accounting firms. Based on the advice and written opinions of Braitman, Aronson and EFP formed new corporations in Puerto Rico to conduct the development work on products to be developed pursuant to the Wenz formula. The purpose of being in Puerto Rico was to take advantage of the complete tax exemption available to new industrial companies **See** Appendix, Vols. , pp_____.

17. Pursuant to Braitman's advice and with the assistance of Patrick Daniels ("Daniels"), a London attorney and a partner at the prominent firm of Simmons & Simmons, Aronson was introduced to a Hong Kong accountant by the name of Peter Wong ("Wong"). **See** Appendix, Vols. , pp_____.

18. Pursuant to Braitman's and Daniels' advice, Aronson and EFP then entered into a new series of research and develop agreements with groups of small businessmen pursuant to the terms of which groups of small businessmen would acquire the exclusive right to distribute the Silver Volt, the electric vehicle to be developed by Aronson, EFP, and their related companies in a particular area of the country. Each of those groups of small businessmen would agree to pay to one of Aronson's related companies, either Electric Auto Corporation ("EAC") of Puerto Rico or Electric Auto Corporation ("EAC") of the Bahamas after Aronson and EFP had moved their business operations to the Bahamas when Puerto Rico had delayed action on their application a tax exemption. **See** Appendix, Vols. , pp_____.

19. In a typical distributorship transaction, a group of small businessmen would pay $460,000 to

EAC and would borrow approximately $360,000 of those funds from Mashand, an investment company supposedly operated by Wong and Daniels for the benefit of wealthy Arabs from Kuwait. Pursuant to representations made in distributorship offering circulars filed with the Federal Trade Commission by Aronson and EAC containing certified financial statements prepared initially by Price Waterhouse & Co. and then by Laventhol & Horwath, another big eight accounting firm, EAC and Mashand were completely independent of one another and none of the funds paid by each group of small businessmen to EAC for research and development were paid directly or indirectly, back to Mashand. **See** Appendix, Vols. , pp._____.

20. These representations were confirmed in writing to EAC's auditors by Daniels, Wong, and by Colin Callendar ("Callendar"), a partner in a prominent Bahamas law firm and supposedly the independent director and owner of Anglo-American Research Ltd. ("Anglo"), a Bahamas research company, supposedly completely independent of EAC and Mashand, which was retained by EAC to perform research and development services as a subcontractor. **See** Appendix, Vols. , pp._____.

21. In 1978 and 1979, Aronson and his related companies entered into fixed turnkey development contracts to develop 19 separate products which could be used in the Silver Volt, as well as in other applications, for 19 separate groups of small businessmen in Southern California connected by their prior business or blood relationships with a certified public accountant by the name of Bernard Kurtin ("Kurtin"), a businessman by the name of Sol Gerber ("Gerber"), and an attorney by the name of Robert T. Gilleran ("Gilleran"). In each year, Kurtin, Gerber, Gilleran, and their relatives and friends participated in

at least one of the 19 separate transactions. In each year, Kurtin, Gerber, and Gilleran, on the basis of their own prior business experience, negotiated the development agreements with Aronson and his related companies so that each of the 19 groups would receive the rights, not only to the technology or product immediately to be developed, some of which was to use an existing patent as a starting point for development, but also to all future technology or products developed by Aronson or his affiliated companies in the product area to which the project related. For example, in the case of one project which involved the development of a controller, the purpose of which involved the development of a controller, the purpose of which is to regulate the flow of energy from batteries in an electric vehicle to the motor, the group which entered into that development agreement with a company affiliated with Aronson, which group includes the Barons, who are petitioners in this case, owns the controllers previously, currently, and that all future times used in the Silver Volt or in any other electric vehicle built by Aronson or his related companies or by any other company using technology licensed to them by Aronson or any company related to Aronson. **See** Appendix, Vols. , pp_____.

22. In the case of each of the 19 transactions, Kurtin, Gerber, and Gilleran, with the assistance of Gerber's son, Richard, who was and is a scientist, carefully selected the particular products which would be so crucial to the production of any electric vehicle so that the ownership of the products and technology in question would give them and their relatives and business associates who were involved in the 19 transactions a signiticant degree of leverage in determining how the business affairs of Aronson and his related companies were conducted. In order to maximize that leverage, none of the 10 groups

which entered into contracts with Aronson and his related companies in 1979 agreed to grant any exclusive license whatsoever to Aronson or his related companies, despite numerous requests and entreaties from Aronson and his related companies. **See** Appendix, Vols. , pp_____.

23. In the case of each of the 19 transactions in 1978 and 1979, Kurtin, Gerber, Gilleran, and their friends and business associates rejected all attempts by Aronson and his related companies to persuade them to enter into distributorship transactions since they felt that ownership and control of the key technology would give them more control and leverage over the business affairs of Aronson and his related companies than would participation in the distributorship transactions which would not give them ownership or control of any technology. **See** Appendix, Vols. , pp_____.

24. In the case of each 1978 and 1979 transaction, transactions which are not before this Court, Gilleran, with the approval of all participants, received legal fees to protect the participants in case of I.R.S. attack. In the case of those transactions, Kurtin and Gerber also, with the approval of all participants, received fees for their efforts in assisting with the consummation and ongoing auditing of the transactions. **See** Appendix, Vols. , pp_____.

25. Prior to doing any business with Aronson and his related companies, Kurtin, Gerber, and Gilleran thoroughly investigated the 13 year prior business history of Aronson in the field of electric vehicles and received positive reports. At their request, Richard Gerber also personally travelled to Detroit and to the Bahamas to inspect the business facilities of Aronson and his related companies as well as working prototypes of several electric vehicles previously built by Aronson and his com-

panies. Richard Gerber's reports were quite positive. **See** Appendix, Vol. , pp_____. Kurtin also spoke directly with Braitman of Price Waterhouse & Co. who assured Kurtin that Aronson and his companies were legitimate. **See** Appendix, Vol. , pp_____.

26. Prior to doing any business with Aronson or his related companies, Kurtin, Gerber, and Gilleran also obtained and examined carefully market projections for electric vehicles and actual expenditures by the U.S. Department of Energy and by General Motors on the development of electric vehicles and components thereof. **See** Appendix, Vols. , pp_____.

27. In 1979, petitioners Irvin and Janet Morhar ("Morhar") heard about Aronson and Electric Auto through their Son, Richard, a certified public accountant who had worked for Kurtin at the beginning of his career. Morhar, an engineer, had recently retired from a career with the County of Los Angeles. For a substantial number of years before his retirement, Morhar had served as the Commissioner of Roads for the County of Los Angeles and had supervised about 1,500 employees and a budget in excess of $150 Million Dollars a year. In the course of his position as Commissioner or Road, Morhar often entered into fixed turnkey fee contracts in order to protect the County against cost overruns. In the course of his position as Commissioner or Roads, Morhar also became personally familiar with the severe pollution standards which the State and Federal governments were planning to implement in the County of Los Angeles and, as the Commissioner of Roads, felt that the standards could be achieved only if a significant number of electric vehicles were put into service in Los Angeles County. **See** Appendix, Vols. , pp_____.

28. Based on the advice of his son, Richard, on his examination of materials on the business history of Aronson and his related companies, on his

examination of materials relating to the parallel efforts of the DOE and General Motors to develop a practical electric vehicle and the components necessary to build such a vehicle, and on his own personal knowledge of the strict pollution standards to be implemented in Los Angeles County, Morhar, together with 9 other individuals, including Gilleran, entered into an agreement with Aronson and one of his related companies to develop a product to be known as a battery cycle heating system which would, if successfully developed, increase the efficiency of batteries in an electric vehicle by 50% or more by keeping the batteries at a constant temperature. **See** Appendix, Vols. , pp_____.

29. Over the next several years, Morhar, Gilleran, and the other members of the battery cycle heating system group received detailed technical reports indicating that the product had been successfully developed and tested and was in the process of being further improved. **See** Appendix, Vols. , pp_____.

30. Despite being informed that the battery cycle heating system product was to be used as standard equipment, together with other of the 19 products, in the Silver Volt vehicle, the battery cycle heating system group refused to grant an exclusive license to Aronson or his related companies to use that technology and decided, on the basis of DOE projections of the market for electric vehicles, to have their product produced instead on an OEM basis. **See** Appendix, Vols. , pp_____.

31. After receiving advice from Dr. Charles Badcock ("Badcock"), an independent expert in the field of batteries, and after corresponding with patent attorneys in Washington D.C., the battery cycle heating system group decided to maintain their technology as technical know-how rather than to obtain a patent on the product which might enable companies such

as General Motors to invent around the patent. **See** Appendix, Vols. , pp_____.

32. By September of 1980, Aronson, EAC, and their subcontractors had successfully developed and built several prototype Silver Volt machines, containing many of the products developed for the 19 California groups pursuant to the 1978 and 1979 development agreements. Those Silver Volt vehicles had been tested, with excellent results, by a well-known independent testing laboratory in Detroit and had received national press and television coverage. **See** Appendix, Vols. , pp_____.

33. Having developed and successfully tested several prototype Silver Volts, what remained to be done before the Silver Volt could be put into mass production was a tremendous amount of road and crash testing necessary to meet federal safety standards. **See** Appendix, Vols. , pp_____ and videotapes entered into evidence in U.S. Tax Court as Exhibit 35.

34. In late 1980, Aronson and other principals of EAC, including Sir Jon Samuel ("Samuel"), a well-known British engineer and developer of electric vehicles, brought the Silver Volt to Southern California in order to demonstrate the Silver Volt and its components to the members of the 19 groups. **See** Appendix, Vols. , pp_____ and videotapes entered into evidence in U.S. Tax Court as Exhibit 35.

35. Based upon negotiations with Aronson, Samuel, and other representatives of EAC, upon advice from Laventhol & Horwath, a big eight accounting firm, upon expenditures by the DOE and General Motors on similar projects, together with market projections for electric vehicles generated by the DOE, upon their prior business experience with Aronson, EAC, and their related companies, and and upon a written tax opinion of William Beverly, Esq.

("Beverly"), delivered to them with the express intention that they would rely upon Beverly's opinion, the petitioners and many of the individuals who had participated in the 1978 and 1979 transactions entered into the transactions which are before this Court. **See** Appendix, Vols. , pp._____. **Contrary to one of the numerous erroneous and baseless statements made in the opinion of the U.S. Tax Court below, Gilleran did not participate in any transactions with Electric Auto after 1979 because of disputes with Aronson over the manner in which the production and sale of the 1978 and 1979 products was being ingored in favor of a mad rush to develop the entire Silver Volt vehicle. See** Appendix, Vols. , pp._____.

36. As was typical of the 1980 and 1981 EAC research transactions which are before this Court, Morhar, who was retired and, according to the Commissioner's own records, living on a gross retirement income of $40,000 a year which put him in a 25% tax bracket, without taking into account any deductions claimed by him in connection with transactions with Electric Auto, paid a fixed turnkey contribution of $30,000 each year to EAC to complete the development and testing of the Silver Volt to a point where the Silver Volt could be put into mass production. In return, Morhar did not receive the ownership of any new technology developed by EAC with those funds but obviously would benefit, by virtue of his 1979 agreement, from any improvements and testing of the battery cycle heating system. Pursuant to the terms of his 1980 and 1981 agreements with EAC, which bear a remarkable resemblance to the agreements entered into in the **Snow** case **supra (See Appendix, Vols. , pp._____.)**, Morhar was to receive a certain fixed percentage of the gross sales price of every Silver Volt sold in the State of California. **See** Appendix, Vols. , pp._____. Naturally, since the battery

cycle heating system was to be standard equipment in every Silver Volt, Morhar would also be increasing the market for and earning profits from the sales of battery cycle heating systems for each Silver Volt built and sold on a worldwide basis. Since the battery cycle heating system group had refused to give EAC any exclusive or lengthy license to use the battery cycle heating system technology, Morhar and the other participants in the 19 development contracts entered into with Aronson and his related companies in 1978 and 1979, Morhar and those other participants would have effective veto power over any action which Aronson, EAC, and their related companies wished to take. **See** Appendix, Vols. , pp_____.

37. Pursuant to the terms of the 1980 and 1981 agreements, each participant was offered an opportunity to borrow a portion of the funds paid to EAC from the subsidiary of a large Bahamian bank known as Artoc Bank ("Artoc"). Prior to entering into any 1980 or 1981 agreements with EAC on behalf of themselves of their clients, Kurtin and Gerber personally travelled to the Bahamas and met with one Robert Bease ("Bease"), the managing director of Artoc. At that meeting, Kurtin and Gerber received annual reports of Artoc showing that the majority of Artoc was owned by prominent members of the Kuwaiti government who are frequently in the news these days. These annual reports contained certified financial statements prepared by the big eight accounting firm of Coopers & Lybrand which certified that Artoc had hundreds of millions of dollars of liquid assets. At that meeting, Kurtin and Gerber also received a copy of the financing agreement pursuant to the terms of which Artoc had agreed to loan up to $12 Million Dollars to participants in the EAC research transactions. That financing agreement contained to reference whatsoever to any agreement

whereby EAC would return to Artoc, directly or indirectly, any portion of the research funds paid to them by participants in the 1980 and 1981 transactions. In fact, in response to direct questions by Kurtin and Gerber as to whether any portion of the research funds would be circulated back to Artoc, directly or indirectly, Bease emphatically responded in the negative. **See** Appendix, Vols. , pp_____.

38. Based upon the information he received from Kurtin, from his son, Richard, and upon his own examination of Artoc's financing agreement and annual reports, Morhar decided to take advantage of the loans. In both 1980 and 1981, Morhar borrowed $25,000 from a subsidiary of Artoc. In each case, Bease of Artoc personally met Morhar at Morhar's bank and handed him a cashier's check for $25,000 after Morhar had executed a full recourse promissory note in favor of Artoc's subsidiary. Morhar then deposited those checks into his own personal account and issued a check in the amount of $30,000 to EAC. **See** Appendix, Vols. , pp_____.

39. **Contrary to the inference drawn by Judge Simpson in the Tax Court opinion below, there is absolutely no evidence that Morhar or any of the other petitioners in this case received any assurance whatsoever, whether orally or in the form of a so-called side-agreement, that he would not be liable to pay the full amount of principal and interest due on the note on the due date whether or not the Silver Volt was ever put into mass production. See** Appendix, Vols. , pp_____. **This is perfectly consistent with the Commissioner's own internal reports and records on audits of participants in the EAC 1980 and 1981 transactions which indicate that some, but by no means all, such participants had copies of side-agreements granting them extensions or cancellations of their loan obli-**

gations if certain levels of production of the Silver Volt were not met within certain periods of time. See Appendix, Vols. , pp_____.

40. In 1980 and 1981 and thereafter, Morhar and the other petitioners continued to receive detailed progress reports on the development of the Silver Volt. In 1980 and 1981, Morhar and the other petitioners received certified financial statements prepared by Laventhol & Horwath stating that the entire amount of their research contributions to EAC had been spent on research and development and qualified for deduction under 26 U.S.C. § 174. **See** Appendix, Vols. , pp_____. In reliance upon the certified financial statements and upon the advice of his own son, Richard, a certified public accountant, Morhar claimed a $30,000 deduction on his 1980 and 1981 tax returns.

41. In late 1982, Morhar received information from the Commissioner indicating that the Commissioner was going to challenge his 1979, 1980, and 1981 deductions and assert against him substantial additional taxes, interest, and punitive penalties. Having never been audited before by the Commissioner, Morhar, together with the other petitioners in this case, was sufficiently disturbed that he and they declined to enter into any future transactions with EAC. **See** Appendix, Vols. , pp_____.

42. At the same time, the Commissioner assaulted Aronson personally and his associated companies with claims for taxes, interest, and penalties in amounts exceeding $100 Million Dollars. **See** Appendix, Vols. , pp_____.

43. Both the petitioners and Aronson and his associated companies contested the Commissioner's assertions of additional taxes, interest, and penalties by filing petitions in U.S. Tax Court. Despite the fact that such action is explicitly prohibited by law, the Com-

missioner sent collection notices and notices of levy both to the petitioners and to Aronson during the Tax Court proceedings. **See** Appendix, Vols. , pp._____.

44. As is apparent from an examination of Aronson's testimony during the second week of the Tax Court trial immediately after Aronson and the Commissioner had announced, after a private meeting with Judge Simpson, that the Commissioner and Aronson had agreed to settle their disputes for an undisclosed amount, Aronson's testimony at that time; namely that the Mashand and Artoc loans were mere circular financing and that neither Mashand nor Artoc ever intended to collect on those loans is completely inconsistent with Aronson's prior and subsequent testimony and with subsequent attempts by Artoc, Mashand and Aronson to collect on those loans or to use those loans to deprive the petitioners and other participants in the EAC transactions of their just participation in the EAC transactions. **See** Appendix, Vols. , pp._____.

45. As illustrated by Aronson's testimony after he and the Commissioner had made a deal during the trial, EAC was able to obtain certified financial statements from Laventhol & Horwath by paying the bulk of the funds received from participants in the EAC transactions to EAC's subcontractor, Anglo, which then, contrary to the explicit representations of Callendar, Daniels, and Wong, recirculated those funds back to Mashand or Artoc. Laventhol & Horwath never, as they certainly should have in a certified audit, followed the trail beyond the transfers from EAC to Anglo. **See** Appendix, Vols. , pp._____ and petitioners' Exhibits 50 and 51.

46. Contrary to the findings of one three judge panel of the U.S. Court of Appeals for the Ninth Circuit below, petitioners' attorney did not agree at the Tax Court trial to waive any objections to the private con-

ferences held by Judge Simpson with Aronson, Aronson's attorney, and the Commissioner's attorney. Nor did the petitioners' attorney ever agree to waive the right to seek further information on the terms of the Commissioner's deal with Aronson once the terms of that deal became a matter of public record in U.S. Tax Court. The basic terms of that settlement, a compromise of a $100 Million Dollar tax claim for $20,000, combined with a comparison of Aronson's testimony given immediately after the deal was made with Aronson's prior sworn testimony and subsequent actions are so outrageous as to call into question the basic integrity of the proceedings below. **See** Appendix, Vols. , pp._____.

ARGUMENT

1. Rarely has this Court been confronted with such a blatant attempt by the lower courts to ignore and subvert clear prior decisions of this Court. The fact that something of this magnitude and seriousness would even be attempted by a lower court below, the U.S. Tax Court, is an Article I court, rather than an Article III court, that U.S. Tax Court trials are conducted without the constitutional protections of a jury trial and before judges, such as Judge Simpson, who have spent all or part of their careers working for the Commissioner. By no means should this petition or this argument be interpreted as an attack upon the integrity of Judge Simpson or of other judges of the U.S. Tax Court who have cooperated with him in issuing opinions designed solely to punish and exterminate all participants in tax shelter transactions, regardless of what the law might say and regardless of what the facts might be. Judge Simpson and these other U.S. Tax Court judges obviously believe that they are acting in the best interests of this nation.

2. **Unfortunately, as subsequent events have shown, Judge Simpson and other judges of the U.S. Tax Court were and are sadly and tragically mistaken. Although every expert witness at the Tax Court trial, including experts who had had the opportunity to test both the Silver Volt and the prototypes developed pursuant to the DOE's $180 Million Dollar failed program to develop a practical electric vehicle and including the Commissioner's own expert witness, testified that the Silver Volt had succeeded where the DOE program had failed (See Appendix, Vols. , pp._____), Judge Simpson permitted the Tax Court's slaughter of the EAC participants to continue, thereby stifling, to this day, the successful mass production of the Silver Volt. As an examination of recent California legislation indicates, the public has had to force the development of electric vehicles by legislation and the contract to build those vehicles for California has gone to a Swedish, not to an American, firm. See** Appendix, Vols. , pp._____.

3. With respect to the negligence penalty under 26 U.S.C. § § 6653 (a) (1) and (a) (2), the standard used by the Tax Court below and adopted by the Ninth Circuit is completely contrary to the standard announced by this Court in **U.S. v. Boyle supra** and followed by the U.S. Court of Appeals for the Ninth Circuit in **Betson v. Comm.** 802 F.2d. 365 (CA 9 1986) in an opinion authored by Justice Kennedy before he was elevated to this Court.

4. With respect to the right of the petitioners to claim deductions under 26 U.S.C. § 174 for the unborrowed portions of their research payments to EAC, the standards adopted by the courts below are completely contrary to the standards announced by this Court in **Snow et. ux. v. Comm, supra** and an attempt to resurrect the standards adopted by the

lower courts and soundly rejected by this Court in the **Snow** case. The attitude of the lower courts towards this Court's decision in the **Snow** case is accurately summarized by the following language in **Spellman v. Comm.** 845 F.2d. 148 (CA 6 1988), one of the two Sixth Circuit opinions upholding the standard applied by the U.S. Tax Court in this case:

> "The Supreme Court's interpretation of § 174 (a) (1) fairly invited the creation of R & D tax shelters, and the bar quickly took up the invitation. See, e.g., Moore, Ayers & Pope, *How Limited Partnerships Tax-Shelter the R & D of New Products or Technology*, 49 J. Taxation 138 (1978); ... The nature of the invitation is well illustrated by this case."
>
> **Spellman v. Comm. supra** at 151.

5. The standards applied by the courts below in denying the petitioners any deduction whatsoever under 26 U.S.C. § 174 for the unborrowed portions of their payments to EAC are also completely inconsistent with the standards adopted in three of the Commissioner's own published Revenue Rulings; Rev. Rul. 69-484, 1969-2 C.B. 38; Rev. Rul. 73-20, 1972-1 C.B. 133; and Rev. Rul. 73-324, 1973-2 C.B. 72, in which the Commissioner ruled that companies making unrefundable fixed research contributions to industry associations would be entitled to deductions under 26 U.S.C. § 174 for the full amounts when paid even though the contributors would not own any of the resulting technology or products.

6. Analyzed in light of the "sham" test announced by this Court in **Frank Lyon v. Comm. supra**, the decisions of the courts below are also incorrect since, even assuming that there was no objective business function for the circular financing, there is absolutely no evidence that the petitioners knew or could have known of the existence of that financing. The busi-

ness reality of the underlying transaction is more than amply proven by the parallel development efforts of the DOE and of General Motors.

7. With respect to the additional interest penalty asserted under 26 U.S.C. § 6621 (c), the decisions of the courts below are again clearly wrong since a disallowance of a deduction on the grounds that the petitioners were not engaged in a trade or business is simply not a basis for upholding the assertion of this penalty based on the clear language of the statute. If the business reality of the transaction is in question, then the business reality is more than adequately proven by the DOE's expenditure of $180 Million Dollars and General Motors' expenditure of more than $50 Million Dollars on parallel projects unless, of course, the DOE was stealing from the American public or General Motors was stealing from its shareholders. The decisions of the courts below on this issue are also inconsistent with the recent **en banc** decision of the U.S. Tax Court in **McCrary v. Comm. surpa** in which even the U.S. Tax Court held that the imposition of this penalty would be too draconian in a case such as this in which the petitioners have conceded their entitlement to the borrowed portion of their deductions once they were made aware of the circular nature of the financing.

8. With respect to the abuse of discretion by the U.S. Tax Court in conducting private conferences with the Commissioner's attorney, Aronson, and Aronson's attorney, during the trial below, that conduct, combined with the Commissioner's settlement of a $100 Million Dollar tax claim against Aronson and his associated companies for $20,000 and with the obviously purchased testimony given by Aronson in connection with that deal, is enough to persuade any U.S. citizen that the Commissioner and the U.S. Tax Court were simply trading off a large liability of Aronson

and his associated companies which might be difficult to collect for testimony which would permit the successful collection of many millions of dollars of punitive taxes, interest, and penalties from the petitioners in this case and from hundreds of other participants in the EAC transactions.

CONCLUSION

The decisions of the courts below should be reversed. The petitioners should be permitted to deduct in 1980 and 1981 the unborrowed portion of their research payments to EAC. The Commissioner should not be entitled to any penalties whatsoever from the petitioners. If this Court will remove the burden of the Commissioner from the petitioners, the petitioners will have more than adequate remedies under the RICO statute, 18 U.S.C. § § 1961-1968, as interpreted by the Ninth Circuit in **United Energy Owners et. al. v. U.S. Energy Management Systems et. al.** 837 F.2d. 356 (CA 9 1988), to regain control of the EAC transaction and to put the Silver Volt on the road.

October 9, 1990 _____
Dated

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FILED
JUL 10 1990
Cathy A. Catterson, Clerk
U.S. COURT OF APPEALS

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSEF BEN-PORAT and CLAIRE BEN-PORAT,

Petitioners-Appellants,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

No. 88-7337
Tax Ct. No. 12700-85

IRVIN L. MORHAR and JANET MORHAR,

Petitioners-Appellants,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

No. 88-7338
Tax Ct. No. 44006-85

BEN ROCHELLE and the estate of JANE BEEBE-ROCHELLE, et al.,

Petitioners-Appellants,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

No. 88-7339
Tax Ct. No. 12705-85
GERALD P. BARON and BONNIE BARON,
Petitioners-Appellants,
v.
COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee.

No. 88-7340
Tax Ct. No. 24950-85
MEMORANDUM*

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Appeal from a Decision of the
Tax Court of the United States

Argued and Submitted June 4, 1990
Pasadena, California

Before: BROWNING and PREGERSON, Circuit Judges and ORRICK, ** District Judge

Upon due consideration, we affirm the disallowance of deductions under **26 U.S.C. §174** and the imposition of additions to tax under **26 U.S.C. §§6653 and 6621** for the reasons set forth in the Tax Court's carefully considered opinion.

We also reject Petitioners-Appellants' contention that the Tax Court abused its discretion when it refused to "conduct additional proceedings on the issue on (sic) whether the Commissioner had in effect bought Mr. Aronson's testimony" by settling its case against him. Both Aronson and the Commissioner's counsel asserted at trial that the only agreement between them was for Aronson to pay a certain deficiency amount and to tell the truth. Taxpayers' counsel then agreed that this testimony disposed of the matter. There was no abuse of discretion.

AFFIRMED.

** The Honorable William H. Orrick, Jr., District Judge for the Northern District of California, sitting by designation.

PROOF OF SERVICE

STATE OF CALIFORNIA)

ss:

COUNTY OF RIVERSIDE

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 4075 Agate Street, Riverside, California 92509.

On October 9, 1990, I served the within Petition for Writ of Certiorari on the interested parties in said action, by placing 3 copies in each of two (2) sealed envelopes, with postage thereon fully prepaid, in the United States mail at San Bernardino, California, addressed as follows:

U..S. Department of Justice
Appellate Section
Tax Division
Post Office Box 502
Washington, D.C. 20044
Attention: Gary R. Allen, Esq. and
Ms. Laura O'Hanlon, Esq.

U.S. Stepartment of Justice
Office of the Solicitor General
Washington, D.C. 20530
Attention: Kenneth W. Starr, Esq.

I certify under penalty of perjury that the foregoing is true and correct.

EXECUTED on October 9, 1990 at Riverside, California.

_____

JACK GALLAGHER